

**STATEMENT OF MICHAEL ANDERSON, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, AT THE HEARING BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS ON S. 391, "A BILL TO PROVIDE FOR THE DISPOSITION OF CERTAIN FUNDS APPROPRIATED TO PAY JUDGMENT IN FAVOR OF THE MISSISSIPPI SIOUX INDIANS, AND FOR OTHER PURPOSES."**

**July 8, 1998**

Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity to present the views of the Department of the Interior on S. 391, a bill entitled "The Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998."

S. 391 is a proposed amendment to Title II of Public Law 92-555 dated October 25, 1972. Title II provides that after the payment of attorney fees and litigation expenses, the funds awarded in the Indian Claims Commission Docket 142 and one-half of the funds awarded in Docket 359, plus accrued interest, shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll.

We first want to commend the Committee and Committee staff for seeking the Department's views on its various legislative proposals to address the long judicial and administrative delays in making the final payments on the judgment fund. While we support the goal of bringing this matter to a close, we have continuing concerns with certain aspects of S. 391. However, before discussing these concerns further, we will present a brief history of the Mississippi Sioux judgment fund.

In 1967, the Indian Claims Commission awarded \$5,097,575 in Docket 142, and \$776,464.50, the share of the Sisseton and Wahpeton Sioux Tribes of an award in Docket 359, to the Eastern or Mississippi Sioux. The awards to the Sisseton and Wahpeton Bands of Sioux represent an additional payment for over 25 million acres of land in Minnesota, Iowa, and South Dakota taken in 1831 and 1851. In 1972 Congress enacted legislation to distribute these funds to the Sisseton-Wahpeton Tribe of South Dakota, the Devils Lake Tribe (now the Spirit Lake Tribe) and the Assiniboine and Sioux Tribe of the Fort Peck Reservation, and all other Sisseton and Wahpeton Sioux Indians (lineal descendants).

The lineal descendants' share of this award was originally \$1,469,831.50. However, with accrued interest, the current account is valued at \$15.2 million. The Bureau of Indian Affairs (BIA) has yet to distribute these funds due to a morass of legal challenges and difficulties associated with the preparation of the roll. The lineals' share of the funds has been the subject of four law suits since 1987. One of the suits, *Loudner v. U.S.*, is still pending before the district court. The decision in *Loudner* requires the BIA to reopen the enrollment application process for the lineal descendants. We anticipate that we may receive 10,000 new applications which must be processed by the BIA to determine their eligibility to share in the fund including applicants who now reside in Canada. The new applicants who are determined to be eligible will be added to the list of 1,988 individuals already determined as eligible to share in the judgment fund distribution.

S. 391, as amended, would change the allocation of the lineals' share of the funds to the Tribes with

the intent to more accurately reflect the distribution scheme stated within the 1972 Act. We have included an addendum to this statement to more clearly illustrate the various distribution schemes.

Subsection 8(b)(1) describes the proposed allocation scheme for the lineal descendants. It provides that an adjustment shall be made in the amount to be distributed to the lineal descendants under subsection 8(a), if the total number of enrollees is less than 2,588. To correct an omission in the formula, the phrase “percent of the amount referred to under subsection (a)” should be inserted after the number “.0277” in subsection 8(b)(1)(B)(I).

If the total fund of \$15.2 million were divided today, the lineal descendants share under the new legislation would be \$10,883,276. Using that figure as the amount referred to in subsection (a) and the revised formula we are suggesting, the tribes would receive \$3,014.66 in additional funds for each per capita share less than 2,588.

With respect to subsection 8(c) requiring consultation with the Sisseton-Wahpeton Tribe, Spirit Lake Tribe and Assiniboine and Sioux Tribe, we object to this provision because it will greatly increase the cost of the roll preparation, increase the time required to prepare the roll, and it will unnecessarily invade the privacy of the applicants. It is the job of the BIA to ensure the accuracy of the lineal descendant’s eligibility. Our estimated annual cost for reopening the enrollment process is over \$100,000 for salaries, supplies and materials, as well as travel and meeting costs. Adding the requirement for the BIA to consult with three tribal entities on each of the new applications could increase the annual cost by 25 percent, and could add years to the time it will take to complete the process. It is our understanding that the plaintiffs in the *Loudner* case have identified at least 2,000 new applicants. We fully anticipate that the total number of new enrollees will exceed 600. We believe that the costs associated with the proposed tribal consultation process will not lead to a reduction in the lineal descendants’ share or a corresponding increase in the funds payable to the three tribal groups.

The cost and time required to prepare the roll will increase because the BIA will be required to consult with three tribal groups on approximately 10,000 enrollment applications filed by individuals who are not, nor are they applying to become, members of the three tribal groups. Additional time and money will be required to make three sets of copies of each enrollment application and the supporting documentation. Tracking systems will have to be developed to track the tribal comments concerning each applicant. Methods will have to be developed to allow each applicant to respond to any negative tribal recommendations, and new appeal procedures will have to be developed to ensure due process.

The privacy of the applicants would also be invaded because sensitive documents such as paternity statements and adoption records would have to be released to the three tribal groups. No assurances have been made that the records will remain confidential and no recourse is available to the applicant if the records are disclosed. We believe that the disclosure of these records to the three tribal groups may have a chilling effect on the application process.

The intent of subsection 8( c) is to limit the number of new enrollees who are determined to be eligible to share in the lineal descendants' share of the funds. Using today's dollar figures, the maximum amount the tribes could receive in additional funds is \$1,808,802, less attorney fees. The calculation the BIA has used to arrive at this figure is 600 shares multiplied by \$3,014.67. If there are 400 new enrollees, the tribes would receive \$602,934, less attorneys fees.

We suggest that changes be made to Sections 5 and 6, regarding the manner in which the Tribes will establish their trust funds and the Secretary's related oversight and trust responsibilities. The Department administers approximately 1,600 trust fund accounts for about 300 tribes. Under the American Indian Trust Fund Management Reform Act of 1994, Congress provided tribes the authority to withdraw and manage their trust funds, including judgment funds. S. 391 deviates from this model by calling for management by Tribes for continued management of Indian trust funds; with continued Secretarial trust responsibility. Varying models for management of Indian trust funds, makes their management more complex. We therefore recommend that the bill be revised to utilize the existing authorities provided under the Reform Act.

The Department opposes section 9(d) of the bill concerning the waiver of affirmative defenses. Section 9(d) would prohibit the United States from asserting any affirmative defenses otherwise available under rule 8(c) of the Federal Rules of Civil Procedure in the event of a future lawsuit. The Department opposes this provision because it would allow the parties against whom the United States has successfully asserted such affirmative defenses in the past to re-initiate their failed litigation efforts against the United States should certain private individuals seek to challenge either the constitutionality of or the validity of distributions under the proposed legislation. The Department also understands that the Department of Justice will be commenting separately on this provision.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.

## **DISTRIBUTION SCHEMES**

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### **Public Law 92-555, October 25, 1972**

Within the Act, Title II provides that after the payment of attorney fees and litigation expenses, the funds awarded in Indian Claims Dockets 142 and one-half of the funds awarded in Docket 359, plus accrued interest, shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll as follows:

**TABLE I**

<u>Tribe or Group</u>	<u>Percentage</u>
Devils Lake Sioux Tribe (a.k.a. Spirit Lake Sioux Tribe)	21.6892
Sisseton-Wahpeton Sioux Tribe	42.9730
Assiniboine and Sioux Tribe of the Fort Peck Reservation	10.3153
All other Sisseton and Wahpeton Sioux	25.0225

**TABLE II**

The enrollment that was prepared under the 1972 Act was as follows:

<u>Tribe or Group</u>	<u>Enrollees</u>	<u>Percentage</u>
Spirit Lake Sioux Tribe	2,187	15.7963
Sisseton-Wahpeton Sioux Tribe	6,006	43.3803
Assiniboine and Sioux Tribe of the Fort Peck Reservation	3,664	26.4644
All other Sisseton and Wahpeton Sioux (lineal descendants)	1,988*	14.3590

**TABLE III**

Proposed Division of the remaining fund under Section 4

	Lineal Descendants 71.6005%	Tribal Shares 28.3995%	
Total fund as of July 1998	\$15,200,000	\$10,883,276	\$4,316,724
Min/Max Number enrollees		1,988	2,588
Per capita share amount if the \$15.2 million were distributed in July 1998 to 2, 588 enrollees	\$4,205.28		

**Table 4 - Current Proposed Section 8 Adjustment**

Amount tribes would receive if there	Amount lineal Decedents would
( <b>remainder</b> = -0- new enrollees) 600	subsection (a)= 10,883,276.00 <u>(16.62)</u> 10,833,259.38
<u>.0277</u> <u>x</u> \$	
16.62	

0.0277; Multiplied by  
the remainder of: 2,588  
 minus the number of individuals on  
 final roll of lineal descendants           (1,988)  
 (**remainder** = -0- new enrollees) 600

**Table 5 - Suggested Revision to Proposed Section 8 Adjustment**

Amount tribes would receive if there were -0- new enrollees	Amount lineal Decedents would receive
( <b>remainder</b> = -0- new enrollees) \$ 3,014.67  <u>X 600</u> \$1,808,802.00	Subsection (a) = \$ 10,883,276.00  <u>\$ (1,808,802.00)</u>  \$ 9,074,474.00

0.0277% of the amount paid under subsection (a) = \$ 3,014.67

multiplied by the remainder of: 2,588  
minus the number of individuals on  
final roll of lineal decedents (1,988)  
(**remainder** = -0- new enrollees) 600

\* Information from Bureau of Indian Affairs Enrollment